

85860-8
NO. 28495-6-III

STATE OF WASHINGTON
COURT OF APPEALS - DIVISION III

FILED
JUN 22 2010
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

STATE OF WASHINGTON,

Respondent,

vs.

JOSE VELIZ, JR.

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR
FRANKLIN COUNTY

BRIEF OF RESPONDENT

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STATEMENT OF FACTS

Jose R. Veliz, Jr. (hereafter "Appellant") and Lorena Velasco (formerly Veliz) were married at one time and had a child in common, who was named Nicole. (RP 45). At the time of the Appellant's jury trial, Nicole was 5 years old. (RP 45). On May 5, 2008, Ms. Velasco obtained an Order of Protection against the Appellant. (RP 45). The Appellant was present at that hearing and was aware of the Order. (RP 45). In the Order for Protection, the Appellant was allowed visitation with Nicole "weekends Saturdays and Sundays or in accordance with a court-approved parenting plan." (CP 37). The Order went on to state that visitation was from Saturdays at 10:00 am until Sundays at 5:00 pm. (CP 37).

On August 17th or 18th of 2008, the Appellant picked up Nicole and never returned her. (RP 46-47). When 5:00 p.m. came on Sunday, Ms. Velasco waited an hour and then called the police. (RP 47).

On December 15, 2008, the Appellant and Nicole attempted to cross the border from Mexico into the United States at San Ysidro, California. (RP 83). The Appellant had an outstanding bench warrant and was arrested. (RP 91). At the time of his arrest, the Appellant had a Washington State driver's license, a social

security card, and a birth certificate that he presented to authorities. (RP 100). He also gave them Nicole's birth certificate. (RP 100). The Appellant had additional identification bearing the name Joel Rodriguez in his possession at the time of his arrest. (RP 97). The identification was admitted at trial over the defense objection. (RP 98).

Ms. Velasco was not reunited with her daughter again until December 21, 2008, in the Pasco airport. (RP 47-48). The Appellant had taken Nicole to Mexico in the intervening three and a half months. (RP 79). During the time that they were gone, neither the Appellant nor Nicole had any contact with Ms. Velasco. (RP 48).

PROCEDURAL HISTORY

On August 22, 2008, the Appellant was charged by Information with Custodial Interference in the First Degree, RCW 9A.40.060(2)(a). (CP 56-57). The information alleged that the Appellant denied access to Lorena DeVeliz, the other parent having a lawful right to time with Nicole. (CP 56-57). In violation of the law, the Appellant intended to hold Nicole permanently or for a protracted period of time. (CP 56-57).

On August 18, 2009, the Appellant filed a Knapstad motion

to dismiss. State v. Knapstad, 107 Wash.2d 346, 729 P.2d 48 (1986). He alleged that even if all the State's facts were true, the charge would nevertheless have to be dismissed because the State could not prove a court-ordered parenting plan. (CP 39-43). The court disagreed and the Honorable Carrie L. Runge rendered a decision adverse to the Appellant on August 25, 2009, holding that the Order for Protection could qualify as a court-ordered parenting plan. (RP 10-12). In doing so, she held that "the criminal statute looks to a broader definition of court-ordered parenting plan and does not necessarily limit it to what we might think of when we look to the domestic statutes." (RP 10-11). After her ruling she went on to say that whether the State would be able to prove its case beyond a reasonable doubt regarding that element would be an issue for the trier of fact. (RP 11).

The Appellant was convicted after a Jury Trial on August 27, 2009. (CP 5). He was sentenced to six months and was given credit for 79 days. The Appellant's sentence was stayed pending the outcome of the appeal in this Court.

STANDARD OF REVIEW

The Respondent concedes that this appeal was made after entry of a final judgment and that the appeal is properly in this

Court. RAP 2.2(a)(1). The Appellant assigns multiple issues of error. The first issue, a challenge to the sufficiency of the evidence, is one that an appellant may raise for the first time on appeal. State v. Alvarez, 128 Wash.2d 1, 13, 904 P.2d 754 (1995). "The standard of review is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt." State v. Rempel, 114 Wash.2d 77, 82, 785 P.2d 1134 (1990) citing State v. Green, 94 Wash.2d 216, 221, 616 P.2d 628 (1980) See also Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781 (1979).

The second issue before this Court is whether the Order for Protection could qualify as a court-ordered parenting plan. In denying the Appellant's Knapstad motion, the Honorable Carrie L. Runge construed the Custodial Interference statute in favor of the State. (RP 10-12). She ruled that the Order for Protection could qualify as a court-ordered parenting plan. (RP 11). This Court reviews questions of statutory interpretation and claimed errors of law de novo. Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wash.2d 1, 9, 43 P.3d 4 (2002). See also State v. Lewis, 141 Wash.App. 367, 382, 166 P.3d 786 (2007); Pasco v. Public Empl.

Relations Comm'n, 119 Wash.2d 504, 507, 833 P.2d 381 (1992); Inland Empire Distrib. Sys., Inc. v. Util. & Transp. Comm'n, 112 Wash.2d 278, 282, 770 P.2d 624 (1989).

“The primary objective of statutory construction is to carry out the intent of the Legislature by examining the language of the statute.” State v. Pesta, 87 Wash.App. 515, 521, 942 P.2d 1013 (1997) citing Stone v. Chelan County Sheriff's Dep't, 110 Wash.2d 806, 809, 756 P.2d 736 (1988). Fundamentally, the courts retain the ultimate authority to interpret a statute. Franklin County Sheriff's Office v. Sellers, 97 Wash.2d 317, 325-26, 646 P.2d 113 (1982), cert. denied, 459 U.S. 1106, 103 S.Ct. 730, 74 L.Ed.2d 954 (1983).

Finally, the last issue for this Court to review—whether evidence of an alias was properly admitted at trial—is subject to an abuse of discretion standard. See State v. Thomas, 150 Wn.2d 821, 856, 83 P.3d 970 (2004); State v. Swan, 114 Wn.2d 613, 658, 790 P.2d 610 (1990); Reese v. Stroh, 128 Wn.2d 300, 310, 907 P.2d 282 (1995). Decisions about evidentiary issues lie squarely within the sound discretion of the trial court. Maehren v. City of Seattle, 92 Wash.2d 480, 488, 599 P.2d 1255 (1979). A trial court's decision in this case can be reversed only if no reasonable

person would have decided the matter in the same way. State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997); State v. Huelett, 92 Wash.2d 967, 969, 603 P.2d 1258 (1979).

ARGUMENT

A. THE EVIDENCE IN THIS CASE WAS SUFFICIENT TO SUPPORT THE JURY'S VERDICT.

The Appellant argues that the conviction in this case for Custodial Interference in the First Degree was not supported by substantial evidence. His argument is without merit. In reviewing the case, this Court must decide whether there is sufficient evidence to support a determination that each element of the crime was proven beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980).

"All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." State v. Partin, 88 Wash.2d 899, 907, 567 P.2d 1136 (1977), citing State v. Woods, 5 Wash.App. 399, 404, 487 P.2d 624 (1971). A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences drawn therefrom. State v. Salinas, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial evidence and direct evidence are equally reliable for purposes of drawing inferences. State v. Delmarter, 94 Wash.2d 634, 638, 618 P.2d 99 (1980).

In this case, the Appellant's conviction was supported by substantial evidence. The Appellant was present when the Order for Protection was entered and he knew of its provisions. (RP 45). The Appellant also understood the visitation portion of the order as Ms. Velasco testified that he abided by its provisions in May, June and July. (RP 46). Circumstantially at least, the Appellant impliedly consented to the visitation section of the Order by his performance for three and a half months. A rational trier of fact could clearly find that the Order could qualify as a parenting plan.

Ms. Velasco told the jury that the Appellant took Nicole on the 17th or 18th of August. (RP 46-47). When 5:00 pm came, the Appellant did not return Nicole. (RP 47). When the Appellant and Nicole attempted to cross the border back into the United States, the Appellant had identification in another name. (RP 96-97). Not only is this evidence of flight, it is evidence of deception. Based on the evidence presented at trial, taken in the light most favorable to the State, a rational trier of fact could find the Appellant guilty beyond a reasonable doubt.

B. THE ORDER FOR PROTECTION IN THIS CASE WAS SUFFICIENT TO SATISFY THE STATUTORY REQUIREMENT FOR THE CRIME OF CUSTODIAL INTERFERENCE IN THE FIRST DEGREE.

The Appellant's argument that the Order for Protection in this case is insufficient is incorrect and without merit. The Appellant made a Knapstad motion to dismiss the case which was denied by the trial court. The court reviewed and based its decision on the applicable case law. State v. Pesta, 87 Wn.App. 515, 942 P.2d 1013 (1997); State v. Carver, 113 Wn.2d 591, 781 P.2d 1308 (1989); State v. Boss, 144 Wn.App. 878, 184 P.3d 1264 (2008) aff'd 167 Wash.2d 710, 223 P.3d 506 (2009). The court held that based on those cases, "the criminal statute looks to a broader definition of court-ordered parenting plan and does not necessarily limit it to what we might think of when we look to the domestic statutes." (RP 10-11). Given the fact that in a Knapstad motion, all reasonable inferences are drawn in favor of the State, the decision was correct.

The lawfulness of an order "is a question of law appropriately within the province of the trial court to decide as part of the court's gate-keeping function." State v. Boss, 167 Wash.2d 710, 718, 223 P.3d 506 (2009) quoting State v. Miller, 156 Wash.2d 23, 24, 123

P.3d 827 (2005). There was not an allegation in our case that the Order was not lawful, only that it did not fit the Custodial Interference statute.

Appellant here is trying to narrow the definition of “parenting plan” for purposes of the Custodial Interference statute to make it as stringent as the definition is in the context of the domestic relations statutes. That reasoning has been expressly rejected by Division One. State v. Pesta, Supra at 522. Accordingly:

It would be, at best, a strained interpretation for us to conclude that the Legislature intended an element of the crime of custodial interference to include details of a parenting plan that are irrelevant to the question of entitlement to time with the child. In short, the allocation of decision-making, temporary support, and restraint provisions of RCW 26.09.194(2) are irrelevant to the custodial interference statute. They have nothing to do with deprivation of the right to time with the child.

Id. at 524. Because the Order in this case that provided a visitation schedule for when the Appellant had the right to time with Nicole, the Order for Protection was sufficient under the statute.

In holding that the Order for Protection qualified as a court-ordered parenting plan, the court pointed out that “whether the State can establish its case beyond a reasonable doubt with regards to that element will be up, ultimately, to the trier of fact—a

jury in this particular case.” (RP 11). After an initial finding that the Order for Protection was lawful, whether it sufficiently met the Custodial Interference statute was a decision properly kept in the province of the jury.

The “to convict” language in the jury instructions set forth five elements that the State had to prove beyond a reasonable doubt. (CP 16). The second element was that “the [Appellant] during the time between the 16th day of August, 2008, and the 17th day of August, 2008, intentionally took, enticed, retained, or concealed his child from the other parent having the lawful right to time with the child pursuant to a court-ordered parenting plan.” (CP 16). The jury was properly instructed on the law and rendered a decision of guilt beyond a reasonable doubt. The fact that the Appellant does not like and does not agree with the jury’s decision is not enough to reverse it.

C. THE VISITATION PROVISIONS IN THE ORDER ARE VALID AND ENFORCEABLE.

The Appellant’s argument that the Order for Protection’s provisions are not enforceable is without merit. There is no dispute that the Appellant was aware of the Order’s provisions as he was present at the hearing where it was entered and he acknowledged

receipt of it. (RP 10). In reviewing the Order, the trial court noted that on the first page, the minors are listed and that the Appellant was restrained from having contact with the petitioner as well as those children. (RP 11). Likewise, the Honorable Carrie L. Runge held that the court's intent was to restrain the Appellant from having contact with the petitioner and her children, and to provide for visitation between the Appellant and his daughter Nicole. (RP 11).

The court recognized and the Respondent herein concedes that item 15 was not checked by the court. However, the trial court in admitting the evidence reasonably concluded that the slight scrivener's error went to the weight of the evidence and not the admissibility. It is clear from the context that the Honorable Robert G. Swisher intended the visitation portion to be part of agreement (RP 12) as he added the specific language to the Order and initialed right next to his writing.

The trial court never even contemplated that the Order was not enforceable and instead decided whether it qualified under the Custodial Interference statute as a "court-ordered parenting plan." (RP 10). Appellant is employing circular reasoning. On one hand he strenuously argues that the Order for Protection does not qualify as a court-ordered parenting plan under the statute while on the

other hand he argues that the Order is not even enforceable in the first place. His argument of unenforceability should be rejected out of hand. It is clear from the context that the Order is valid and enforceable as Judge Swisher added language to it, initialed it, and validly entered it after obtaining the Appellant's signature and acknowledgement.

At trial, Ms. Velasco testified that the Appellant abided by the Order's provisions in May, June and July of 2008 (RP 46). The Appellant's acceptance by silence and subsequent performance is circumstantial evidence that he impliedly consented to the Order or at least agreed to be bound by and follow its conditions. Because a scrivener's error goes to weight and not admissibility and because the trial court's intent was clear, this Court should hold that the Order for Protection was valid and enforceable and that the Appellant was bound by its conditions.

**D. THE TRIAL COURT DID NOT ERR IN
ADMITTING EVIDENCE THAT THE
DEFENDANT USED AN ALIAS.**

Appellant argues that the trial court erred in admitting evidence that he possessed identification in an alternate name at the time he was apprehended at the border. His contention is without merit. At the border, Appellant produced identification for

himself in the form of a Washington State driver's license, a social security card, and a birth certificate that he presented to authorities. (RP 100). The Appellant had additional identification bearing the name Joel Rodriguez in his possession at the time of his arrest. (RP 97). The identification was admitted over the defense objection. (RP 98).

Washington courts have held that evidence of an alias is not per se inadmissible but that it must be relevant and material to prove issues in a case. State v. Elmore, 139 Wash.2d 250, 283, 985 P.2d 289 (1999) citing State v. Cartwright, 76 Wash.2d 259, 264, 456 P.2d 340 (1969). In State v. Chase, 59 Wash.App. 501, 508, 799 P.2d 272 (1990) for example, evidence of an alias was properly used to link the defendant to the crime. In this case, evidence of the Appellant's alias was used for multiple purposes.

First, it was properly admitted as circumstantial evidence of flight. The Appellant took Nicole to Mexico and had identification in a name other than his own and tried to use an alternate name when making his border crossing. At trial the prosecutor argued that it was relevant "to the fact that the Appellant took flight with his daughter for four months and that he was using an alias when he was returning to the United States." (RP 95). The trial court

agreed, finding that the evidence was probative of the Appellant's intent and was potential evidence of flight. (RP 95). The jury should have been permitted to hear that evidence and decide the amount of weight to place upon it.

Second, the evidence of an alias was properly admitted to impeach the Appellant's testimony. When asked whether he used a different name when he came across the border, Appellant testified that he did not; that he used the name Joe Veliz, Junior. (RP 94). That testimony was completely contradictory with what actually happened and the State's purpose to show that the Appellant was lying (RP 95) was permissible. Juries are instructed that they are the sole judges of credibility and it was important at trial that the jury in this case had all the relevant information to be able to decide whether the Appellant was credible and whether his testimony was believable; credibility is always an issue. When a defendant makes a claim that "I would never do something like that," he opens the door to proof that he would.

Based on the abuse of discretion standard, it is clear that the evidence of the Appellant's alias was properly admitted. It was both relevant and material to prove issues in the case and reasonable people would have decided the matter in the same way.

deposes and says:

That she is employed as a Legal Secretary by the Prosecuting Attorney's Office in and for Franklin County and makes this affidavit in that capacity.

I hereby certify that on the 21st day of June, 2010, a copy of the foregoing was delivered to Jose R. Veliz, Jr., Appellant, 3820 West Henry, Pasco, Washington 99301 and to Antonio Salazar, 891 Lake City Way NE #1, Seattle, Washington 98115 and to George Trejo, Jr., Trejo Law Firm, 701 N First Street Suite 100, Yakima, Washington 98901-2296 by depositing in the mail of the United States of America a properly stamped and addressed envelope.

Carol A. Domas

Signed and sworn to before me this 21st day of June, 2010.

M. L. Johnston

Notary Public in and for
The State of Washington,
residing at Pasco
My appointment expires:
September 10, 2010

cld